

ACTIVITY 19. Freedom of Speech

Do you think there should be limits to a person's right to free speech?

Consider each question carefully. Then circle either yes or no.

1. Suppose you strongly disagree with the motto written on your car's license plate. Do you have a right to conceal the motto by taping over it? YES NO
2. Suppose you have written a speech that government officials think might cause a riot. Do you have a right to deliver it anyway? YES NO
3. As a practical joke, suppose you want to create some excitement in a crowded theater by shouting "Fire! Fire!" Is it your constitutional right to do this? YES NO

Every American citizen's right to freedom of speech is guaranteed in the First Amendment to the Constitution. But this guarantee does *not* apply to everything you may want to do and say. If the public safety is threatened by your acts, then *perhaps* the government may penalize you.

In some cases, an individual's right to free speech is thought to be more important than the public safety. In other cases, the public's need for law and order is thought to be more important. Who decides such questions? First, cases involving the right to free speech are decided in the lower courts. If they are appealed, the final decision in the case may be made by the U.S. Supreme Court.

Under what circumstances—if any—does the Constitution allow the government to stop a person from speaking freely in order to protect public safety? How would *you* answer this question if you were a judge on the Supreme Court? Consider the facts and arguments in the case of *Feiner v. New York*.

FEINER V. NEW YORK

Argued: October 17, 1950

Decided: January 15, 1951

Facts of the case

One evening in March, 1949, a student named Irving Feiner stood on a wooden box on a city sidewalk and addressed a crowd over a loudspeaker system. Someone in the neighborhood called police headquarters to complain about the meeting. Two officers were sent to investigate. They found a crowd of about 75 people consisting of both blacks and whites. The crowd filled the sidewalk and spilled over onto the street.

Feiner's main purpose in giving the speech was to urge his listeners to attend a meeting later that night. In the course of his speech, he made harsh statements about President Truman, the American Legion, and the mayor of Syracuse. He said that blacks should arm themselves and fight in the streets for equal rights.

The police were alarmed by the excited reaction of the crowd. Three times, they told Feiner to stop his speech. But Feiner ignored them. People in the crowd began to push and shove each other. There was strong feeling both for and against the speaker. The police officers finally stepped in to prevent angry feelings in the crowd from resulting in a fight. Feiner was arrested for disorderly conduct.

In court, Feiner's lawyer argued that his client's constitutional right to free speech had been violated.



Arguments of the prosecutor for the State of New York

The police were faced with a very tense situation. They understood that a breach of the peace might occur at any moment. If the speech had been allowed to continue, the angry mood of the crowd probably would have turned into open violence. Therefore the arrest of Feiner was necessary to preserve the peace. Furthermore, it is important to remember that Feiner insisted on speaking even after the police had repeatedly warned him to stop. Feiner's defiance of police authority made acts of violence even more likely if the arrest had not been made.

Arguments of the defense attorney for Irving Feiner

It was Feiner's constitutional right to hold a meeting on the street corner. The conduct of the crowd did not make this meeting unlawful. Instead of controlling and arresting the speaker, the real duty of the police officers was to control members of the crowd. The police may intervene when and if violence occurs but not before. It does not matter that Feiner refused to stop speaking when ordered to do so by the police. After all, he was free to continue, since it was his right under the Constitution to do so.

GUIDELINES FOR JUDGING FREE SPEECH CASES

Supreme Court judges will always refer back to past cases to help them make a decision. Often they find in these earlier cases a general rule—or guideline—for determining whether a speaker may or may not be arrested. Here are four such guidelines that you should consider before making your decision.

WHEN CAN A SPEAKER BE ARRESTED?

1. *Clear and present danger test.* If a speech creates an obvious and immediate threat to the public safety, then the government may legally step in to prevent the speech. (Opinion in *Schenck v. U.S.*, 1919)

2. *Bad tendency doctrine.* If a speech tends to create an illegal action, government officials may stop it. (Opinion in *Gitlow v. New York*, 1925)

WHEN IS IT WRONG FOR THE GOVERNMENT TO PROHIBIT SPEECH?

3. *Vagueness test.* No law can be so vague and general that people will not speak freely for fear of violating the law. (Opinion in *Stromberg v. California*, 1931)

4. *Least restrictive means.* No law may restrict (limit) freedom of speech if there is some other way to handle the problem. (Opinion in *Shelton v. Tucker*, 1960)

THINKING IT OVER

1. What constitutional issue was involved in *Feiner v. New York*? _____

2. What argument presented by *Feiner's* lawyer seems to you to be a good one? _____

3. What argument presented by New York State's lawyer seems to you to be a good one? _____

4. Review the "Guidelines for Judging Free Speech Cases" (page 82). Which of the four guidelines seems to apply to this case?

_____ Does it support Feiner's argument or New York's argument? _____

Explain. _____

5. If you were a judge on the Supreme Court, would you decide in favor of Feiner or New York? _____ Why? _____

6. In the Appendix, page 251, you will find the actual decision of the Supreme Court. What was the decision? _____

7. Do you think there should be limits to a person's right to free speech? _____ If so, how would you define those limits?

If not, explain. _____

ACTIVITY 20. Freedom from "Unreasonable" Searches

What procedures must the police follow when searching for evidence?

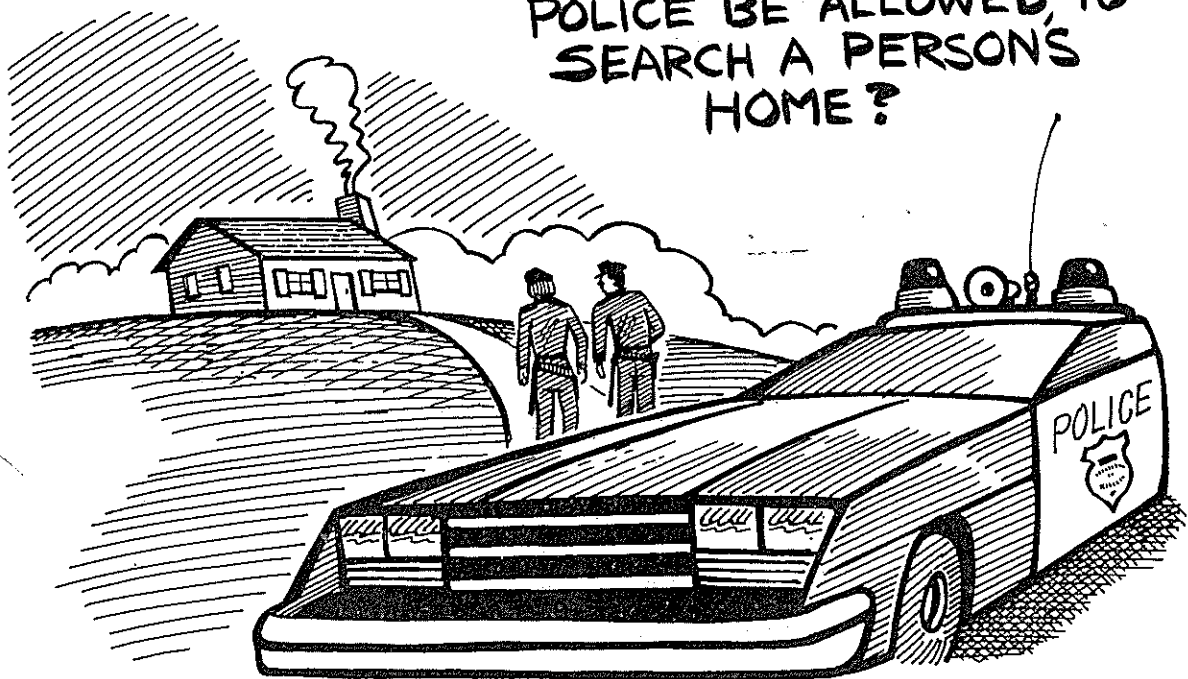
The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

—Fourth Amendment

An American citizen has a right to think of his or her home as a "castle" that is secure against the forced entry of government officials. This right is guaranteed in the Fourth Amendment of the Constitution. However, the amendment does not forbid all searches and seizures of property, only those that are "unreasonable." A person's home, body, or vehicle may be searched if a police officer has good reason to do so and carries out the search in a lawful manner.

As a rule, a person's property may not be searched unless a search warrant is first issued to the investigating officer. To obtain such a warrant, a police officer must follow certain guidelines. The most important ones are listed in the "Guidelines" on the next page.

**WHEN SHOULD THE
POLICE BE ALLOWED TO
SEARCH A PERSON'S
HOME?**



GUIDELINES FOR ISSUING A SEARCH WARRANT

1. A *search warrant* is a document that gives a police officer the authority to search some person, place, or vehicle. A judge may issue such a warrant only if he or she judges it probable that the person to be searched has committed a crime. This reasonable suspicion is called "probable cause."

2. A police officer cannot be given general authority to search anywhere for anything at all. Instead, the search warrant must give specific information about the objects for which the officer is looking and the address where the objects may be found. For example, if an apartment is to be searched, the warrant must identify its precise location: address, apartment number, and floor number.

3. To obtain a search warrant, a police officer must fill out an *affidavit*—a sworn, written statement. This affidavit gives the officer's reasons ("probable cause") for suspecting criminal activity. If the information in the affidavit is not true and the falsehood is intentional, then the police officer may be arrested.

4. A warrant must be issued by a judge who has no prejudice in the case. If the warrant is issued without "probable cause," the evidence seized by the officer may be considered invalid. Such evidence may be excluded (kept out) at a trial.

5. Under certain circumstances, a search warrant is *not* required. Whether or not they have a warrant for doing so, police officers may search the following individuals:

- a. anyone who freely consents to being searched
- b. an arrested person before being placed in jail
- c. an armed or dangerous person

A warrant is *not* needed if the police see, in plain view, evidence which could lead to a criminal charge. It is *not* required if there is a likelihood of evidence being destroyed before the police officer can obtain a warrant.

Test your understanding of these rules for search and seizure by entering into an imaginary situation. Imagine that you are beginning your career in law enforcement. As part of your training, you have been assigned to assist Officer Smith, a 14-year veteran of your community's police department. You are hoping that, as a result of your good police work, you will soon be considered for a promotion to the detective squad.

First, however, you must demonstrate that you know when and how to conduct a search. You must be careful that you do not seek a search warrant too soon before there is "probable cause"—nor too late to gather the evidence needed. Your promotion will depend on the judgment you show in this one case: the *Case of the Vanishing Submachine Gun*. If you make a mistake, either making your move too soon or too late, you may never get your promotion.

After each episode in the case, say whether you would or would not apply for a search warrant. It may even be necessary to apply for such a warrant more than once. If you decide at some point that a search warrant is needed, fill out the blank form provided on page 86. Your teacher, in the role of judge, will review the warrant and then sign it if it is constitutionally correct. (Note: Ordinarily, it is the judge that fills out the entire search warrant on the basis of an affidavit signed by the police officer. But for the purposes of this activity, you should be the one to write out the warrant.) If the teacher refuses to sign your warrant, you have lost your opportunity to be promoted.

SEARCH WARRANT

The people of the State of _____ : To all peace officers of the state: On this day _____, Complainant has subscribed and sworn to a complaint for a search warrant before me. Upon examination of the complaint, I find that it states the following facts:

These facts are sufficient to show probable cause. I therefore command that you search _____
(name) at the following address: _____

_____ in apartment _____ located at the cross streets of _____

In addition, you are herein granted permission to search the following rooms (areas):

_____ in seeking to find the following items: _____

and seize these items if found. These items have been used in the commission of a crime or constitute evidence of the offense of _____

I further command that a return of anything so seized shall be made without unnecessary delay before _____
(date)

Judge Issuing Warrant
(Teacher)

THE CASE OF THE VANISHING SUBMACHINE GUN

Stage I

January 24. You and Officer Smith have just arrested someone on a charge of armed robbery. During the interrogation (questioning), the suspect happened to say that one of the residents at 235 Elm Street is a dealer in illegal submachine guns. In fact, two months ago, the suspect had bought the gun used in the robbery from this person but cannot remember the name of the dealer. The suspect remembered that the gun dealer lives on the 6th floor, but has forgotten the exact apartment number.

A. AT THIS POINT, WOULD YOU ASK FOR A SEARCH WARRANT?

_____ YES _____ NO Explain. _____

January 25. Officer Smith recalls that he had once arrested someone named S. Jones, who had lived at 235 Elm Street. Officer Smith runs the name of S. Jones through the police computer. The computer reports that Jones is now wanted for escaping from an Arizona jail.

B. AT THIS POINT, WOULD YOU ASK FOR A SEARCH WARRANT?

_____ YES _____ NO Explain. _____

Stage II

January 26. On patrol, you notice S. Jones carrying an oversized violin case into the apartment building at 235 Elm Street. You follow Jones and see him enter Apt. 6F. Officer Smith states that Jones should be arrested now on the charge of escaping from jail.

Knocking on the door, you announce that you are the police. You hear the sound of drawers being rapidly opened and closed inside the apartment. You are admitted into the apartment by A. Greenwald, who claims to be a friend just visiting S. Jones. Then Jones himself appears. Officer Smith announces that Jones is under arrest for escaping from jail. Officer Smith tells you to search Jones.

C. AT THIS POINT, WOULD YOU ASK FOR A SEARCH WARRANT?

_____ YES _____ NO Explain. _____

Jones is searched, and a loaded handgun is removed from a pocket. You inform Jones that he will be taken to the police station. He asks you if he may get his coat from the closet. Officer Smith tells you to search that closet first.

D. AT THIS POINT, WOULD YOU ASK FOR A SEARCH WARRANT?

_____ YES _____ NO Explain. _____

In searching the closet, you observe an open violin case containing a submachine gun. You tell Officer Smith what you found. Smith remembers seeing a closed violin case in the next room and asks you to find out if there are any guns in that case. Jones says: "Go ahead. We have nothing to hide. You can even search the whole apartment if you want."

E. AT THIS POINT, WOULD YOU ASK FOR A SEARCH WARRANT?

_____ YES _____ NO Explain. _____

You open the second violin case and find a bazooka inside. Meanwhile Officer Smith notices a large bag of white powder on the top of a dresser in the room. Having spent 14 years in drug enforcement, Smith believes the powder to be heroin. Smith says, "There must be other bags of this stuff hidden somewhere."

F. AT THIS POINT, WOULD YOU ASK FOR A SEARCH WARRANT?

_____ YES _____ NO Explain. _____

You and Officer Smith begin a more thorough search of the apartment. After unlocking a closet, you find another bag of white powder. Meanwhile Officer Smith discovers a bag of marijuana hidden in a drawer. Then you find a machine gun hidden in another closet.

THINKING IT OVER

1. A New York City police officer trained in search procedures has provided his answers to "The Case of the Vanishing Submachine Gun." Refer to the Appendix (page 252) and compare your decisions in the case with his.

(a) At what point (if any) did YOU ask for a search warrant?

Date _____

Event _____

(b) At what point (if any) did the TRAINED POLICE OFFICER ask for a search warrant?

Date _____

Event _____

2. Did the judge (your teacher) deny your request for a search warrant? _____ If so, what reason was given? _____

3. Did you perform an illegal search? _____ If so, why did you make the error? _____

4. Let us suppose you had asked for a search warrant at the proper time. Check those crimes for which Jones could have been charged.

- ☐ escaping from jail
- ☐ possession of a handgun
- ☐ possession of a submachine gun
- ☐ possession of a bazooka
- ☐ possession of heroin
- ☐ possession of marijuana

5. Some people have suggested that the procedures for conducting a search are too complicated and difficult.

Do you agree? _____ Explain. _____